Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

JOSEPH PAYNE,

Petitioner,

v.

MILWAUKEE COUNTY, MILWAUKEE COUNTY PERSONNEL REVIEW BOARD, and JEFFREY M. JENTZEN, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Circuit Court for the Seventh Circuit Court of Appeals err in improperly limiting its jurisdiction under 28 U.S.C. § 1291 to bar petitioner from raising all issues decided below on appeal?

2. Is a notice of appeal timely pursuant to 28 U.S.C. § 1291 when filed within 30 days of the "final decision" entered by a magistrate judge?

LIST OF PARTIES

JOSEPH PAYNE is the Petitioner.

MILWAUKEE COUNTY, MILWAUKEE COUNTY PERSONNEL REVIEW BOARD, and JEFFREY M. JENTZEN, M.D. are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Joseph Payne, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered in this case on June 1, 2001.

OPINIONS BELOW

The Order of Seventh Circuit Court of Appeals, dated June 1, 2001, limiting petitioner's appellate rights is reprinted at App. 1 to 2 of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered its decision limiting petitioner's appellate rights on June 1, 2001. The jurisdiction of this court to review the decision of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First Amendment, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, as amended. 28 U.S.C. § 1291, Rules 4(a) and 26(b) of the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure 4(a)(5), 54(b), 59 and 68.

STATEMENT OF THE CASE

Petitioner Joseph Payne commenced this employment discrimination action on December 13, 1993. He alleged he was unlawfully discharged from his employment with the Milwaukee County Medical Examiner's office for exercising his right to free speech under the First Amendment. His claims, based on Title VII and 42 U.S.C. § 1983, were dismissed by the district court, pursuant to FRCVP 50(a), following closing arguments at his jury trial. On appeal, the Seventh Circuit Court of Appeals reversed and remanded for a new trial on petitioner's First Amendment claims. *See, Payne v. Milwaukee County*, 146 F.3d 430 (7th Cir. 1998).

A new trial, before a magistrate judge, was conducted from November 1 through November 4, 1999. The jury found the petitioner's constitutional rights had been violated by two of the three defendants, Milwaukee County and the Milwaukee County Personnel Review Board, and awarded petitioner limited compensatory damages. A judgment against these two defendants was entered on November 5, 1999. (Civil Docket Sheet entry No. 113) This judgment is reprinted at App. 4 of the Appendix to this Petition. The relevant portion of the civil docket sheet for this case, pages eleven through fifteen, is reprinted at App. 5 to 9 of the Appendix to this Petition.

On November 15, 1999, petitioner filed FRCVP Rule 59 motions for remedial relief and a new trial on part of the jury verdict. On November 22, 1999, the respondents filed a motion for an award of costs pursuant to Rule 68. By decision of November 24, 2000, the magistrate judge

denied petitioner's motions and ordered the petitioner to respond to respondents' Rule 68 motion for costs and attorneys' fees by December 18, 2000. (Docket entries nos. 115, 118, 122 & 153)

On December 18, 2000, petitioner filed a Rule 54(b) motion for entry of an appealable final judgment. On December 22, 2000, respondents filed a Rule 55 motion for judgment. Both motions were denied by order of January 10, 2001. The magistrate judge decided the Rule 68 fees and costs issues by decision and order of February 26, 2001. Accordingly, an Amended Judgment, dated March 8, 2001 and entered March 14, 2001, was issued by the court. The Amended Judgment is reprinted at App. 3 of the Appendix to this Petition. (Docket entries nos. 154, 156, 159-160, 164 & 165)

Petitioner filed a notice of appeal, based on the March 8, 2001 Amended Judgment, on March 22, 2001. (Docket entry "___" of 3/22/01). The Seventh Circuit Court of Appeals requested briefs on the issues of the court's jurisdiction to hear an appeal of all issues. On June 1, 2001, the Circuit Court of Appeals issued an order severely limiting petitioner's right to appeal, and limited the appeal to the issues of respondents' request for Rule 68 costs and fees. That appeal is currently ongoing. The June 1, 2001 Order is reprinted at App. 1 to 2 of the Appendix to this Petition.

REASONS FOR GRANTING THE WRIT

I. THIS WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' INTERPRETATION OF ITS JURISDICTION UNFAIRLY LIMITS PETITIONER'S RIGHT TO APPEAL ALL ISSUES, BASED ON A "FINAL DECISION," PURSUANT TO 28 U.S.C. § 1291.

Section 1291 provides that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." In this case, the "final decision" of the magistrate judge was issued March 8, 2001. A notice of appeal was filed March 22, 2001. The Court of Appeals concluded the "final decision" in this case was not the March 8, 2001 Amended Judgment, but the November 9, 1999 Judgment entered after the jury trial. The court found the filing of petitioner's motions for remedial relief and a new trial tolled the time for filing an appeal through the November 27, 2000 entry of the magistrate judge's decision denying petitioner's motions. Thus, the court ruled the March 22, 2001 notice of appeal was filed three months too late to appeal all issues.

In reaching the conclusion that petitioner should have appealed from the November 9, 1999 judgment, if he wanted to raise all issues, the Court of Appeals rejected the plain and obvious fact the final decision made by the magistrate judge was to enter an Amended Judgment. Section 1291 provides the Court of Appeals jurisdiction extends to "final decisions" of the court. This court has traditionally defined a "final decision" as a ruling that "ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 577, 521-22, 108 S.Ct. 1945,

1949, 100 L.Ed.2d 517 (1988); quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945); *Parr v. United States*, 351 U.S. 513, 100 L.Ed. 1377 (1956). In 1999 the court strongly reaffirmed the final judgment rule noting:

> Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from 'final decisions' of the district courts. It descends from the Judiciary Act of 1789 where 'the First Congress established the principle that only "final judgments and decrees" of the federal district courts may be reviewed on appeal.' *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989) (quoting 1 Stat. 84); see generally Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539, 548-551 (1932) (discussing history of final judgment rule in the United States). In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. See, *e.g.*, *Quackenbush* v. *Allstate Ins. Co.*, 527 U.S. 706, 712 (1996); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430 (1985).

Cunningham v. Hamilton County, 527 U.S. 198, 203, 144 L.Ed.2d 184, 119 S.Ct. 1915 (1999).

To reach the conclusion the appeal was untimely filed, the Court of Appeals effectively amended and limited the scope of its jurisdiction under 28 U.S.C. § 1291 from "final decisions" to final decisions on the merits. In this case, following the jury trial, the petitioner's motions for relief and a new trial were integral to the ultimate outcome of the case. The judgment entered following the

jury trial was far from the "final decision" in this case. Petitioner moved for post judgment relief directly related to the jury's findings. Respondents sought costs and fees under Rule 68. The magistrate judge issued further orders, the "final decision" being the entry of the Amended Judgment dated March 8, 2001.

The Court of Appeals' second fundamental error was in equating the petitioner's post trial motions for remedial relief and a new trial on certain jury questions with a request for attorney's fees. This decision does not promote finality. Instead it causes confusion and promotes duplicative appeals. This is not a case like *Exchange Bank v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1981) or *Dunn v. Truck World, Inc.*, 929 F.2d 311 (7th Cir. 1991), both cited by the Circuit Court for the proposition that only final decisions on the merits are appealable and that the court cannot enlarge jurisdictional time periods under FRCVP Rule 4(a)(5) and FRAAP 26(b), respectively. Finality suggests a party's rights be fully adjudicated before an appeal is undertaken. Unlike a post trial request for attorneys' fees, which have no effect on the fundamental judgment, the post verdict motions here were integral to the fundamental judgment.

In this case the initial judgment, entered following the jury trial by the magistrate judge, became the direct subject of petitioner's post verdict motions. Those motions directly attack the verdict and damages as perverse under the facts shown at trial. On November 24, 2000, the petitioner's post verdict motions were denied. On December 11, 2000 petitioner moved the magistrate judge to enter a final order and certify the case for appeal pursuant to FRCVP 54(b). This request was denied by

order entered January 9, 2001. Thus the petitioner requested the right to appeal and was denied.

The magistrate subsequently ruled on the respondent's attorneys' fees request on February 26, 2001, and then as its last and final act, entered an Amended Judgment on March 8, 2001. To find the petitioner's appeal not timely, the Court of Appeals had to overlook the last and final act of the court in entering an Amended Judgment. Section 1291 grants Courts of Appeals jurisdiction over all "final decisions." The Circuit Court has with its June 1, 2001 decision, contrary to the language and spirit of the statute, limited appeals to what it calls "finality of the merits" judgments. That was error here. The judgment entered following the jury trial was not final. It was the subject of petitioner's post trial motions. All the issues were inextricably intertwined. The magistrate judge refused to enter a final, appealable order and certify the case for appeal. Then following a decision granting the respondents' attorneys' fees, the magistrate judge entered an Amended Judgment from which the petitioner appealed. Until the magistrate judge entered the Amended Judgment, the case was not final because the magistrate was still in the position of deciding issues integral to the judgment. The importance of this final act is that once completed, the magistrate was left with nothing to do. Quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the *Cunningham* court noted the final judgment rule serves several purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a

> trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration. *Id.*, at 374 (citations and internal quotation marks omitted).
>
> Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 521-522 (1988) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)).

Cunningham v. Hamilton County, 527 U.S. 198, 203-04, 144 L.Ed.2d 184, 119 S.Ct. 1915 (1999).

The Circuit Court's interpretation of its jurisdiction amounts to an amendment of 28 U.S.C. § 1291 which operates to limit the court's jurisdiction and unfairly deprive litigants of their right to an appeal on all issues at the conclusion of matters before the trial court. Section 1291 limits appeals to "final decisions." The decision appealed from here was "final," because it was the last decision rendered. It left the court with nothing more to do. The Circuit Court's interpretation of a final decision on "the merits" in this case is erroneous, because the merits were at issue, up to and including the time of the

magistrate judge's refusal to issue a final order for an appeal. Because the magistrate was left with numerous judicial actions to take, when the November, 1999 judgment was entered, by definition that could not have been the "final decision" for § 1291 purposes. Appealable issues are limited to "final decisions" or "final judgments" under 28 U.S.C. § 1291. A final decision requires nothing more for the magistrate judge to do other than execute on the judgment. *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999).

The only "final decision" in this case was the Amended Judgment entered March 8, 2001. The Circuit Court's construction of the statute unfairly limits its jurisdiction to certain kinds of decisions on the merits. Section 1291 has no such qualifying language. It provides for appeals from "final decisions." The Circuit Court erred in finding the March 22, 2001 Notice of Appeal untimely as to all issues except for the review of the magistrate's decision on attorney's fees and costs as to both sides. The court further erred in failing to make a distinction between post verdict motions directly challenging the fundamental judgment and mere requests for attorney's fees, which do not affect the basic judgment.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to the Seventh Circuit Court of Appeals to review the order of June 1, 2001.

Dated at Milwaukee, Wisconsin this 20th day of August, 2001.

Respectfully submitted,

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(414) 961-0802

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

June 1, 2001

Before

Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

JOSEPH PAYNE, Plaintiff-Appellant, No. 01-1818 v. MILWAUKEE COUNTY, PERSONNEL REVIEW BOARD, MILWAUKEE COUNTY and JEFFREY M. JENTZEN, M.D., Defendants-Appellees.	]]]]]]]]]]]	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 93 C 1380 Patricia J. Gorence, Magistrate Judge.

ORDER

On consideration of the jurisdictional memoranda filed by the parties and review of the short record,

IT IS ORDERED that this appeal is LIMITED to a review of the district court's order of February 26, 2001, and the amended judgment of March 8, 2001, *only* as it pertains to attorney's fees and costs. *See Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1981).

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case judgment was

entered on November 9, 1999, and the order denying plaintiff-appellant's timely post-judgment motions for new trial and for entry of remedial orders was entered on November 27, 2000, starting the time to appeal, the merits judgment. The notice of appeal filed on March 22, 2001, therefore, is about three months late. The district court has not granted an extension of the appeal period, *see* Rule 4(a) (5), and this court is not empowered to do so, *see*, Fed. R. App. P. 26(b). *See Dunn v. Truck World, Inc.*, 929 F.2d 311 (7th Cir. 1991) (unresolved issues concerning fees and costs have no effect on finality of the merits judgment).

The briefing schedule is as follows:

1. The plaintiff-appellant shall file his brief and required short appendix on or before July 2, 2001.

2. The defendants-appellees shall file their joint brief on or before August 1, 2001.

3. The plaintiff-appellant shall file his reply brief, if any, on or before August 15, 2001.

IT IS FURTHER ORDERED that the clerk distribute, along with the briefs in this appeal, copies of this order, the court's order of April 12, 2001, and the jurisdictional memoranda filed by the parties.

NOTE: **Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to conclusion. The language in the rule that "[t]he disk contain nothing more than the text of the brief . . . " means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the word count should be omitted. The parties are**

advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

United States District Court

EASTERN DISTRICT OF WISCONSIN

Joseph Payne,

Plaintiff

v.

Milwaukee County, Milwaukee County Personnel Review Board, and Jeffrey M. Jentzen, M.D.,

Defendants

AMENDED

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-C-1380

(Filed Mar. 8 2001)

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that plaintiff recover the sum of $10,400 from defendants Milwaukee County and Milwaukee County Personnel Review Board on his First Amendment claim.

[X] **Decision by Court.** This action came before the Court. The decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motion for an award of costs pursuant to Rule 68 of the Federal Rules of Civil Procedure (Docket #122) be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's motion to determine attorney's fees for work performed on behalf of the plaintiff prior to December 10, 1996 (Docket #133) be and hereby is granted in part and denied in part.

IT IS ALSO ORDERED that the plaintiff Payne's motion for an award of attorney's fees (Docket #137) be and hereby is denied.

IT IS FURTHER ORDERED that plaintiff's motion for an enlargement of time to file for attorney's fees and for attorney's fees (Docket #147) be and hereby is denied.

IT IS ALSO ORDERED that the defendants' motion to strike Attorney McNamara-McGraw's motion for attorney's fees and for an enlargement of time in which to file for attorney's fees (Docket #151) be and hereby is denied.

March 8, 2001
Date

SOFRON B. NEDILSKY
Clerk

Approved this 8th day of March, 2001

/s/ Patricia J. Gorence
Patricia J. Gorence,
U.S. Magistrate Judge

/s/ Regina Toreivia
(By) Deputy Clerk

United States District Court

EASTERN DISTRICT OF WISCONSIN

JOSEPH PAYNE,

Plaintiff,

v.

MILWAUKEE COUNTY, MILWAUKEE COUNTY PERSONNEL REVIEW BOARD, and JEFFREY M. JENTZEN, M.D.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-C-1380

(Filed Nov. 5, 1999)

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff recover the sum of $10,400 from defendants Milwaukee County and Milwaukee County Personnel Review Board on his First Amendment claim.

APPROVED:

/s/ Patricia J. Gorence
PATRICIA J. GORENCE
U.S. Magistrate Judge

November 5, 1999
Date

SOFRON B. NEDILSKY
Clerk

/s/ Kathleen A. Fink
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Proceedings include all events. TERMED
APPEAL CONMAG
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2:93cv1380 Payne v. Milwaukee County, et al

* * *

11/1/99	108	Amended PRETRIAL REPORT by defendant Milwaukee County, defendant Jeffrey M Jentzen (cml) [Entry date 11/01/99]
11/1/99	109	HEARING MINUTES: by Mag Judge Patricia J. Gorence; jury trial held 11/1/99 Verdict is for the plaintiff. Plaintiff's petition for attorney's fees is due 12/30/99. Defense counsel will have 30 days to respond. Court Reporter: John Schindhelm (cml) [Entry date 11/09/99]
11/4/99	110	JURY COMMUNICATION(S) re: Special Verdict questions No. 1 & 2 (cml) [Entry date 11/09/99]
11/4/99	111	JURY INSTRUCTIONS submitted (cml) [Entry date 11/09/99]
11/4/99	112	Special VERDICT for plaintiff Joseph Payne against defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen (cml) [Entry date 11/09/99]
11/5/99	113	JUDGMENT: by Deputy Clerk for plaintiff Joseph Payne against defendant Milwaukee County, defendant Personnel Review Bd, terminating case It is

		ordered that the plaintiff recover the sum of $10,400 from defendants Milwaukee County and Milwaukee County Personnel Review Board on his First Amendment claim. (cc: all counsel) (cml) [Entry date 11/09/99]
11/8/99	114	EXHIBITS received for deft Milwaukee County et al., pltf Joseph Payne; exhibit list filed (bet) [Entry date 11/09/99]
11/15/99	115	MOTION by plaintiff Joseph Payne for entry of remedial orders (cml) [Entry date 11/15/99]
11/15/99	116	BRIEF by plaintiff Joseph Payne in support of motion for entry of remedial orders [115-1] (cml) [Entry date 11/15/99]
11/15/99	117	AFFIDAVIT of Robert Sutton in support of motion for entry of remedial orders (cml) [Entry date 11/15/99]
11/15/99	118	MOTION by plaintiff Joseph Payne for new trial as to questions 3 & 4 (cml) [Entry date 11/15/99]
11/15/99	119	BRIEF by plaintiff Joseph Payne in support of motion for new trial as to questions 3 & 4 [118-1] (cml) [Entry date 11/15/99]
11/15/99	120	AFFIDAVIT of Robert E. Sutton in support of motion for a new trial (cml) [Entry date 11/15/99]
11/15/99	121	CERTIFICATE of Service by plaintiff Joseph Payne (cml) [Entry date 11/15/99]
11/22/99	122	MOTION by defendant Milwaukee County, defendant Personnel Review Bd,

		defendant Jeffrey M Jentzen for an award of costs pursuant to Rule 68 F.R.C.P. (cml) [Entry date 11/22/99]
11/22/99	123	BRIEF by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen in support of motion for an award of costs pursuant to Rule 68 F.R.C.P. [122-1] (cml) [Entry date 11/22/99]
11/22/99	124	AFFIDAVIT of Mary Ellen Poulos (cml) [Entry date 11/22/99]
11/22/99	125	AFFIDAVIT of Robert H. Friebert (cml) [Entry date 11/22/99]
11/30/99	126	BRIEF by plaintiff Joseph Payne in opposition to motion for an award of costs pursuant to Rule 68 F.R.C.P. [122-1] (cml) [Entry date 11/30/99]
11/30/99	127	AFFIDAVIT of Robert E. Sutton (cml) [Entry date 11/30/99]
11/30/99	128	CERTIFICATE of Service by defendant Milwaukee County (cml) [Entry date 11/30/99]
12/3/99	129	BRIEF by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen in opposition to motion for new trial as to questions 3 & 4 [118-1] (cml) [Entry date 12/03/99]
12/6/99	130	BRIEF by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen in opposition to motion for entry of remedial orders [115-1] (cml) [Entry date 12/06/99]

12/7/99	131	LETTER re: Motion for Costs and sanctions from defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen (cml) [Entry date 12/07/99]
12/10/99	132	LETTER from plaintiff Joseph Payne re: decision to withdraw an untimely motion (cml) [Entry date 12/10/99]
12/16/99	133	MOTiON by plaintiff Joseph Payne for order to determine attorney's fees for work performed on behalf of the plaintiff prior to 12/10/99 (cml) [Entry date 12/16/99]
12/16/99	134	AFFIDAVIT of Attorney John D. Uelmen in support of motion to determine the amount awarded as attorney's fees for work performed on behalf of the plaintiff prior to 12/10/96 (cml) [Entry date 12/16/99]
12/17/99	135	REPLY BRIEF by pltf in support of motion for new trial as to questions 3 & 4 [118-1], motion for entry of remedial orders [115-1] (bet) [Entry date 12/20/99]
12/17/99	136	CERTIFICATE OF SERVICE by plaintiff (bet) [Entry date 12/20/99]
12/22/99	137	MOTION by plaintiff Joseph Payne for award of attorney fees (cml) [Entry date 12/22/99]
12/22/99	138	AFFIDAVIT of Robert E. Sutton in support of petition for award of attorney's fees (cml) [Entry date 12/22/99]
12/22/99	139	CERTIFICATE of Service by plaintiff Joseph Payne (cml) [Entry date 12/22/99]

1/18/00	140	BRIEF by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen in opposition to motion for award of attorney fees [137-1] (cml) [Entry date 01/25/00]
1/19/00	141	LETTER from plaintiff Joseph Payne re: attorney fees requests (cml) [Entry date 01/19/00]
1/26/00	142	LETTER from defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen re: response to plaintiff's attorney fee position (cml) [Entry date 01/26/00]
1/31/00	143	BRIEF by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen in opposition to motion for award of attorney fees [137-1] (cml) [Entry date 01/31/00]
2/14/00	145	CERTIFICATE of Service by plaintiff Joseph Payne (cml) [Entry date 02/25/00]
2/14/00	144	REPLY BRIEF by plaintiff Joseph Payne in support of motion for award of attorney fees [137-1] (cml) [Entry date 02/25/00]
4/10/00	146	LETTER requesting leave to file for attorney's fees from plaintiff Joseph Payne (cml) [Entry date 04/10/00]
5/8/00	147	MOTION by plaintiff Joseph Payne for enlargement of time to file for attorney's fees, and for attorney fees (cml) [Entry date 05/09/00]
5/8/00	148	BRIEF by plaintiff Joseph Payne in support of motion for enlargement of time

		to file for attorney's fees [147-1], of motion for attorney fees [147-2] (cml) [Entry date 05/09/00]
5/8/00	149	AFFIDAVIT of Larraine McNamara-McGraw in support of plaintiff's motion for award of attorneys fees & out of pocket expenses pursuant to FRCVP 54(d)(2), 1988 (cml) [Entry date 05/09/00]
5/8/00	150	CERTIFICATE of Service by plaintiff Joseph Payne (cml) [Entry date 05/09/00]
6/5/00	151	MOTION by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen to strike Attorney McNamara-McGraw's motion for enlargement of time in which to file for attorney fees and petition for attorney fees (cml) [Entry date 06/05/00]
9/15/00	152	LETTER (9/14/00) from pltf Atty Robert E Sutton re: request for decision on pending motions (bet) [Entry date 09/15/00]
11/24/00	153	ORDER by Mag Judge Patricia J. Gorence denying plaintiff's motion for entry of remedial orders [115-1], denying plaintiff's motion for new trial as to questions 3 & 4 [118-1]. It is further ordered that the plaintiff may file a response to defendants' motion for an award of costs pursuant to Rule 68 by 12/18/00. Any reply brief is due 1/5/01. (cc: all counsel) (cml) [Entry date 11/27/00]

12/18/00	154	MOTION by plaintiff Joseph Payne for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) (cml) [Entry date 12/19/00]
12/18/00	155	CERTIFICATE of Service by plaintiff Joseph Payne (cml) [Entry date 12/19/00]
12/22/00	156	MOTION by defendant Milwaukee County, defendant Personnel Review Bd, defendant Jeffrey M Jentzen for judgment pursuant to Rule 55 FRCP (cml) [Entry date 12/29/00)
12/22/00	157	AFFIDAVIT of Mary Ellen Poulos (cml) [Entry date 12/29/00]
1/2/01	158	NOTICE of hearing by the Court; status hearing set for 1:30 1/9/01 (cc: all counsel) (cml) [Entry date 01/03/01]
1/9/01	159	HEARING MINUTES of telephone status conf held 1/9/01: defendants' motion for judgment pursuant to rule 55 FRCP [156-1] is denied & plaintiff's motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) [154-1] is denied. Plaintiff's response to motion for award of costs is due 1/19/01; defendants' reply due 1/24/01. (vlh) [Entry date 01/10/01]
1/9/01	160	ORDER by Mag Judge Patricia J. Gorence that the pltf's motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) be and hereby is denied. IT IS ALSO ORDERED that the defts' motion for judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure be and hereby is denied. IT IS FURTHER ORDERED that the

pltf's response to the defts' motion for an award of costs pursuant to Rule 68 shall be filed by 1/19/01. The defts' reply brief in support of their motion shall be filed by 1/24/01. (cc: all counsel) (bdr) [Entry date 01/10/01]

1/19/01 161 RESPONSE by plaintiff Joseph Payne to motion of defendants pursuant to Fed. R. Civ. P. 68 [122-1] (vlh) [Entry date 01/22/01]

1/19/01 162 CERTIFICATE of service by plaintiff Joseph Payne (vlh) [Entry date 01/22/01]

1/24/01 163 REPLY BRIEF by defendants in support of motion for an award of costs pursuant to Rule 68 F.R.C.P. [122-1] (vlh) [Entry date 01/26/01]

2/26/01 164 ORDER by Mag Judge Patricia J. Gorence denying motion to strike Attorney McNamara-McGraw's motion for enlargement of time in which to file for attorney fees and petition for attorney fees [151-1], denying motion for enlargement of time to file for attorney's fees [147-1], denying motion for attorney fees [147-2], denying motion for award of attorney fees [137-1], granting in part and denying in part motion for order to determine attorney's fees for work performed on behalf of the plaintiff prior to 12/10/99 [133-1], granting motion for award of costs pursuant to Rule 68 F.R.C.P. [122-1]. IT IS ALSO ORDERED that the Clerk of Court shall enter an amended judgment in accordance with this court's decision. (cc: all counsel)

		(bdr) [Entry date 02/26/01] [Edit date 03/07/01]
3/8/01	165	Amended JUDGMENT: by Deputy Clerk for Plaintiff against defendant. Jury Verdict: IT IS ORDERED AND ADJUDGED that the pltf recover the sum of $10,400 from defts Milwaukee Cty and Milwaukee Cty Personnel Review Board on his First Amendement Claim. See judgment for further details. (cc: all counsel) (bdr) [Entry date 03/14/01]
3/22/01	166	NOTICE OF APPEAL by plaintiff Joseph Payne from 3/8/01 amended judgment [165-1], 2/26/01 memorandum & order [164-1], 1/9/01 order [160-1], & 11/24/00 order [153-1] (cc: all counsel) (vlh) [Entry date 03/26/01]
3/22/01	167	CERTIFICATE of interest by plaintiff Joseph Payne (vlh) [Entry date 03/26/01]
3/22/01	168	JURISDICTIONAL STATEMENT by plaintiff Joseph Payne (cc: all counsel) (vlh) [Entry date 03/26/01]
3/22/01	–	Appeal fee in the amount of $105.00 paid by plaintiff Joseph Payne re: 3/22/01 notice of appeal [166-1] (Receipt #102 201642) (vlh) [Entry date 03/26/01]

Supreme Court, U.S.
FILED
SEP 19 2001
OFFICE OF THE CLERK

No. 01-316

In The

Supreme Court of the United States

JOSEPH PAYNE,

Petitioner,

v.

MILWAUKEE COUNTY, MILWAUKEE COUNTY PERSONNEL REVIEW BOARD, and JEFFREY M. JENTZEN, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

The trial court issued a post-verdict decision on November 24, 2000. This decision concerned substantive issues as appropriate after the jury's verdict. The court denied the plaintiff's motion for remedial orders and for a new trial as to questions 3 and 4 of the verdict.

The trial court issued a second post-verdict decision on February 26, 2001. This decision dealt only with Title 42 U.S.C. §1988 attorney fees requests from three separate attorneys on behalf of the plaintiff and Rule 68 Federal Rules of Civil Procedure costs on behalf of the defendants.

Both of these decisions were the subject of an appeal filed on March 22, 2001.

REASONS FOR DENYING THE WRIT

A. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

Rule 10 of the Supreme Court Rules governs a review by writ of certiorari. This is not an appeal as a matter of right, but of judicial discretion. Subsection (a) to Rule 10 governs this case and reads as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

> course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .

The petitioner has made no effort in his filing to comply with this mandate. The petitioner has made no effort to explain how his situation falls under this Rule. The petitioner does not mention, cite or even allude to this Rule.

The reason for this omission is obvious. The petitioner simply failed to perfect a timely appeal of the order entered on November 26, 2000. Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. The appeal of this order was not made until March 22, 2001 which is far beyond the 30 days. The district court had not granted an extension of the appeal period and the Court of Appeals was not empowered to do so, see, Federal Rule of Appellate Procedure 26(b).

The fact of failing to perfect a timely appeal of a court's order or judgment probably happens every day in the practice of law in the United States. This would hardly seem to qualify for this court to exercise its discretionary supervisory powers as outlined in Rule 10(a) Supreme Court Rules.

This petition should be denied on the ground that the petitioner has failed to establish any entitlement to relief pursuant to Rule 10(a) Supreme Court Rules.

B. THE LAW IS CLEAR THAT UNRESOLVED ISSUES CONCERNING FEES AND COSTS HAVE NO EFFECT ON THE FINALITY OF THE JUDGMENT ON THE MERITS

This case was one to vindicate the Petitioner's First Amendment Rights and was prosecuted under Title 42 U.S.C. §1983 (civil rights actions). The issues as they relate to these substantive rights, the jury trial and post-verdict motions were all dealt with in the decision of the trial court issued on November 26, 2000, and entered on November 27, 2000.

But since this was a civil rights case in which the petitioner was the prevailing party he was also entitled to file attorneys fees petitions with the Court pursuant to Title 42 U.S.C. §1988. The Court denied these fee petition requests on February 26, 2001.

It has been clearly established that a claim for attorney fees under Title 42 U.S.C. §1988 raises legal issues collateral to the main cause of action. *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). The finality of a district court's order disposing of the merits of a case is appealable, separate and apart from the attorney's fees authorized by a separate statute. *Halderman v. Pennhurst School & Hospital,* 673 F.2d 628 (CA3, 1992). The appeal was simply not timely as to the district court decision entered on November 24, 2000 which finalized the case on its merits. *Beckwith Machinery Company v. Travelers Indemnity Company,* 815 F.2d 286 (CA3, 1987).

The Petitioner denied to himself the opportunity to appeal all issues because of his neglect in filing a timely appeal. The Court of Appeals had nothing to do with it.

CONCLUSION

The Petitioner has failed to argue, much less establish, that he is entitled to relief under the discretionary jurisdiction of the Supreme Court pursuant to Rule 10(a) Supreme Court Rules. The Petitioner simply failed to perfect an appellate filing deadline on an appeal from a civil rights judgment or order. The collateral nature of attorney fees requests is clear and unambiguous and there is no conflict between Districts or Circuits.

This petition must be denied.

Dated at Milwaukee, Wisconsin this 19th day of September, 2001.

Respectfully submitted,

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